UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CAPITOL TRANSPORTATION, INC.,		
and		
ARCADIO VIÑAS, an Individual,	Cases	12-CA-180495
		12-CA-181123
and		12-CA-187845
		12-CA-188221
UNION DE TRONQUISTAS DE PUERTO RICO, LOCAL 901, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,		12-CA-199292
		12-CA-201424
		12-CA-213526
and		
ELIAS TORRES, and Individual		

COUNSEL FOR THE GENERAL COUNSEL'S REVISED MOTION FOR ERRATUM TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.35 and 102.45 of the Board's Rules and Regulations, Counsel for the General Counsel moves for the Honorable Administrative Law Judge (ALJ) Michael A. Rosas to issue an erratum to the Administrative Law Judge's decision (ALJD) issued on April 30, 2019 in the above-captioned cases. The ALJD apparently inadvertently omitted certain provisions from his recommended remedy, Board Order and Notice to Employees that are necessary to effectuate the policies of the Act, consistent with the ALJ's findings of fact, conclusions of law, recommended cease and desist orders and Notice to Employees.

It is well settled that an administrative law judge may issue an erratum after the decision issues. *Daniel Construction Co.*, 239 NLRB 1335, 1335 fn. 2 (1979), enfd. mem. 634 F.2d 621 (4th Cir. 1980), cert. denied 450 U.S. 918 (1981). The administrative law judge is authorized to issue post-decision errata to correct material typographical errors, but not to change matters of substance, such as findings on the merits. Board Rules and Regulations, Section 102.35 and

102.45; *Wilco Business Forms*, 280 NLRB 1336, 1336 fn. 2 (1986). In addition to typographical errors, an erratum may be utilized to correct obvious omissions, but only omissions explicitly encompassed by what was said in the decision.

General Counsel respectfully seeks the issuance of an erratum to correct the following apparent obvious omissions:

1. The ALJ erred by failing to include in the recommended remedy and Board Order requirements consistent with his findings of fact and conclusions of law, that Respondent make whole unit employees who were laid off after July 1, 2016, when subcontracted or temporary agency employees were assigned to work, or in violation of their seniority rights, for any loss of earnings and other benefits resulting from their layoffs, without prejudice to their seniority or any other right or privileges previously enjoyed, plus interest. Thus, the ALJ found that Respondent violated Section 8(a)(5) and (1) of the Act by "constantly laying off unit employees after July 1, 2016, in order to assign unit work to subcontracted and/or temporary employees, and then leave those positions vacant." (JD page 9, line 23 to page 10, line 12; page 11, lines 31-35). Accordingly, paragraph 2(b) of the recommended Order states that Respondent shall cease and desist from " Laying off employees on dates when subcontracted or temporary agency employees are assigned to work, or in violation of employees' seniority rights, without the Union's consent and without first giving the Union notice and an opportunity to bargain about the decision to make such changes." (JD page 12, lines 36-39). In addition, the fourth WE WILL NOT paragraph of the ALJ's recommended Notice to Employee contains cease and desist language and the fifth WE WILL paragraph of the Notice to Employees contains affirmative remedial language for the unlawful layoffs of unit employees when subcontracted or temporary agency employees were working, or in violation of their seniority rights. However, the ALJ erred by failing to include a the make whole remedy for this violation of the Act in the recommended remedy and Order.

2. The ALJ erred in the recommended remedy by citing *Latino Express, Inc.*, 359 NLRB No. 44 (2012), a case decided by a Board that included two persons whose appointments to the Board were found to be constitutionally infirm by the Supreme Court in *NLRB v. Noel Canning*, 135 S. Ct. 2550 (2014), and by failing to require that in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2016), Respondent shall compensate Lleras, Viñas, Torres, and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and in accordance with *Advo-Serv of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and, within 21 days of the date the amount of backpay is fixed either by the agreement or Board order, file with the Regional Director for Region 12, a report allocating backpay to the appropriate calendar year(s).

3. The ALJ erred in paragraph 2(c) of the recommended Order and the second WE WILL paragraph of the recommended Notice to Employees by using remedial language from *Latino Express, Inc.*, supra, rather than remedial language set forth above in item 2 from *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2016), and *Advo-Serv of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

4. The ALJ erred by failing to include remedial language from *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2016), and *Advo-Serv of New Jersey, Inc.*, 363 NLRB No. 143 (2016) in the recommended Notice to Employees, with respect to all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights.

5. The ALJ erred by failing to include in the recommended Order a requirement that Respondent rescind the unilateral transfer of unit work to subcontracted or temporary agency employees and restore the status quo by restoring the unit to where it would have been without the

unilateral change. In this regard, the ALJ found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring bargaining unit work to subcontractors and temporary agency employees. (JD page 9, line 23 to page 10, line 12; JD page 11, lines 31-35). Consistent with this finding, paragraph 1(c) of the ALJ's recommended Order states that Respondent shall cease and desist from "Unilaterally transferring unit work to subcontracted or temporary agency employees without giving the Union notice and an opportunity to bargain." (JD page 12, lines 41-42). Similarly, the seventh WE WILL NOT and seventh WE WILL paragraphs of the recommended Notice to Employees contain remedial language consistent with the ALJ's unfair labor practice finding in this regard. Appropriate affirmative remedial language in the recommended Order regarding this unfair labor practice is also necessary to effectuate the policies of the Act.

6. The ALJ erred by failing to in the recommended Order a requirement that Respondent, upon request, meet and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the unit with respect to wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement. In his findings of fact and conclusions of law, the ALJ correctly found that Respondent violated Section 8(a)(5) and (1) of the Act by "failing and refusing to meet and bargain with the Union over a successor agreement after December 29, 2016." (JD page 10, lines 38 to page 11, line 9; JD page 11, lines 38-39). The ALJ also included appropriate cease and desist language for this violation of the Act in paragraph 1(f) of the recommended Order (JD page 13, lines 9-15), and included appropriate cease and desist and affirmative language for this violation of the Act in the eight WE WILL NOT and eighth WE WILL paragraphs of the recommended Notice to Employees. The missing affirmative remedial language should be added to the recommended Order.

In summary, Counsel for the General Counsel is not requesting the ALJ to alter substantive findings or conclusions of law in his Decision, and this motion is totally consistent with the ALJ's determinations. Counsel for the General Counsel only seeks an erratum correcting unintentional but important omissions from the ALJ's recommended remedy, Order and Notice. Making these corrections will simply complete the intended Decision and make it fully effective. Consequently, Counsel for the General Counsel respectfully requests the ALJ to issue a post-decisional erratum that corrects his Decision as set forth above in items 1 to 6.

Attached hereto is proposed language for the remedy, recommended Order and Notice to Employees , with changes from the ALJ Decision issued on April 30, 2019 highlighted.

Dated at San Juan, Puerto Rico this 22th day of May 2019.

Respectfully submitted,

s/ Enrique González Quiñones

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REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. With respect to the Respondent's discriminatory discharge of Luis Lleras, Arcadio Viñas and Elias Torres, it shall be ordered to offer them reinstatement to their former positions or, if those positions no longer exist, in substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired in their place. Lleras, Viñas and Torres shall be made whole for any loss of earnings they may have suffered due to the discrimination against them. All unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, shall be made whole for any loss of earnings resulting from said layoffs. Backpay shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 30 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also be required to expunge from its files any reference to the unlawful terminations of Lleras, Viñas and Torres, and to notify them in writing that this has been done.

In accordance with the Board's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant 35 part 859 F.3d 23 (D.C. Cir. 2017), the Respondent shall be ordered to compensate Lleras, Viñas and Torres, and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Also, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2016), Respondent shall compensate Lleras, Viñas, Torres, and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and in accordance with *Advo-Serv of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and, within 21 days of the date the amount of backpay is fixed either by the agreement or Board order, file with the Regional Director for Region 12, a report allocating backpay to the appropriate calendar year(s). Finally, the Respondent shall also be required to post a Notice to Employees, both in English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Capitol Transportation, Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily discharging employees because of their support for and membership in the Unión de Tronquistas de Puerto Rico, Local 901 IBT (the Union).

(b) Laying off employees on dates when subcontracted or temporary agency employees are assigned to work, or in violation of employees' seniority rights, without the Union's consent and without first giving the Union notice and an opportunity to bargain about the decision to make such changes.

(c) Unilaterally transferring unit work to subcontracted or temporary agency employees without giving the Union notice and an opportunity to bargain.

(d) Delaying in depositing the contributions to employees' savings plan, or make other changes to the terms and conditions of employment expressly set forth in a current collective-bargaining agreement without the Union's consent, and without first giving the Union notice and an opportunity to bargain with it about the decision to make such changes.

(e) Refusing to compensate employees for accrued sick and annual leave when they cease working the Respondent, without giving the Union notice and an opportunity to bargain.

(f) Failing or refusing to bargain in good faith with the Union for a collective-bargaining agreement covering employees in the following unit:

> All employees employed by Capitol Transportation, Inc. (the Employer) engaged in transportation, loading, unloading, warehouse, receipt, dispatch, service, maintenance, cleaning of the warehouse, and related areas; excluding offices, and excluding all employees dedicated to incidental tasks associated with the Employer's operation.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Luis Lleras, Arcadio Viñas and Elias Torres full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Luis Lleras, Arcadio Viñas and Elias Torres whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Make whole all employees in the above unit who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for any loss of earnings and other benefits resulting from said layoffs.

(d) Compensate Luis Lleras, Arcadio Viñas and Elias Torres, and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and within 21 days of the date the amount of backpay is fixed either by the agreement or Board order, file with the Regional Director for Region 12, a report allocating the backpay awards to the appropriate calendar year(s).

(e) Rescind the unilateral transfer of unit work to subcontractors and restore the status quo by restoring the unit to where it would have been without the unilateral change.

(f) Liquidate the accrued annual and sick leave benefits of former employees Mario Reyes, Hiram Lozada and any other former unit employee whom the Respondent failed to compensate for such benefits.

(g) Upon request, meet and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the above unit with respect to wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

(h) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in San Juan, Puerto Rico copies of the attached notice marked "Appendix"[2] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

2 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2016.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail or refuse to bargain in good faith with Unión de Tronquistas de Puerto Rico, Local 901, IBT (the Union) as the exclusive collective-bargaining representative of our employees in the below-described appropriate bargaining unit concerning rates of pay, wages, hours of work, and other terms and conditions of employment:

All employees employed by Capitol Transportation, Inc. (the Employer) engaged in transportation, loading, unloading, warehouse, receipt, dispatch, service, maintenance, cleaning of the warehouse, and related areas; excluding offices, and excluding all employees dedicated to incidental tasks associated with the Employer's operation.

WE WILL NOT fire you because of your union membership or support.

WE WILL NOT lay you off on dates when subcontracted or temporary agency employees are assigned to work, or in violation of your seniority rights, without the Union's consent and without first giving the Union notice and an opportunity to bargain with us about the decision to make such changes.

WE WILL NOT delay in depositing the contributions to your savings plan, or make other changes to the terms and conditions of employment expressly set forth in a current collective-bargaining agreement without the Union's consent, and without first giving the Union notice and an opportunity to bargain with us about the decision to make such changes.

WE WILL NOT refuse to liquidate your accrued sick and annual leave when you cease working with us, without giving the Union notice and an opportunity to bargain.

WE WILL NOT unilaterally transfer unit work to subcontracted or temporary agency employees without giving the Union notice and an opportunity to bargain.

WE WILL NOT fail or refuse to bargain in good faith with the Union for a collective-bargaining agreement covering employees in the unit described above.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Luis Lleras, Arcadio Viñas and Elias Torres immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL pay Luis Lleras, Arcadio Viñas and Elias Torres for the wages and other benefits they lost because we fired them.

WE WILL compensate Luis Lleras, Arcadio Viñas and Elias Torres and all unit employees who were laid off after July 1, 2016, in order to assign unit work to subcontracted or temporary employees, or in violation of their seniority rights, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and within 21 days of the date the amount of backpay is fixed either by the agreement or Board order, file with the Regional Director for Region 12, a report allocating the backpay awards to the appropriate calendar year(s).

WE WILL make whole employees in the above unit for the wages and other benefits they lost because we laid them off on dates when subcontractors or temporary agency employees were assigned to work, or in violation of their seniority rights.

WE WILL liquidate the accrued annual and sick leave benefits of former employees Mario Reyes, Hiram Lozada and any other former unit employee for whom we failed to liquidate such benefits.

WE WILL rescind the unilateral transfer of unit work to subcontractors and restore the status quo by restoring the unit to where it would have been without the unilateral change.

WE WILL upon request, meet and bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the above unit with respect to wages, hours of work, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

CAPITOL TRANSPORTATION, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

South Trust Plaza, 201 East Kennedy Boulevard, Suite 300, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-180495 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (813) 228-2641.

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2019, I served Counsel for the General Counsel's Motion for Erratum to the Administrative Law Judge's Decision in the matter of Capitol Transportation, Inc., Cases 12-CA-180495 et als., upon the following persons, addressed to them at the below electronic addresses, by the means set forth below:

By Electronic Filing to:

Hon. Michael A. Rosas
National Labor Relations Board, Division of Judges

By Electronic Mail to:

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